APPENDIX A

Budweiser HAS RATS
IN THEIR BREWERY
LOCAL # 209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S.

APPENDIX B

[Filed Feb. 27, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56305
D.C. No. CV-97-6419-JMI

ANHEUSER-BUSCH, INC.,
Plaintiff/Appellee,

vs.

CARPENTERS LOCAL 29,
an unincorporated association,
Defendant/Appellant.

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Submitted: February 9, 1998 [*]

Before: PREGERSON, CANBY, and LEAVY, Circuit Judges.

MEMORANDUM [**]

This preliminary injunction appeal comes to us for review under Ninth Circuit Rule 3-3. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

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[*] The panel finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Our inquiry is limited to whether the district court has abused its discretion in granting the preliminary injunction or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

The record before us shows that the district court did not rely upon an erroneous legal pemise or abuse its discretion in concluding that appellee's showing of probable success on the merits and the possibility of irreparable injury was sufficient to warrant the preliminary injunctive relief. *See San Antonio Community Hosp. v. Southern Cal. Dist. Council*, 125 F.3d 1230, 1238-39 (9th Cir. 1997); *see also Chandler*, 83 F.3d at 1152. Moreover, we conclude that the court's factual findings regarding appellant's display of the controversial banner are not clearly erroneous. *See San Antonio*, 125 F.3d at 1239; *Chandler*, 83 F.3d at 1152. Thus, the district court did not err by concluding that the Norris-La Guardia Act does not deprive it of jurisdiction to issue the injunction. *See* 29 U.S.C. §104(e); *San Antonio*, 125 F.3d at 1238-39.

Accordingly, the district court's grant of a preliminary injunction is AFFIRMED.[1]

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[1] Appellant's request for judicial notice is granted.

APPENDIX C

[Filed Sep. 17, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-97-6419 JMI (JGx)

ANHEUSER-BUSCH, INC.,
Plaintiff,

v.

CARPENTERS LOCAL 209, AFL-CIO,
Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

IT IS HEREBY ORDERED:

Plaintiff, Anheuser-Busch seeks a preliminary injunction to prohibit the Carpenters Local 209 from displaying a banner that uses the Budweiser trademark logo or making fraudulent statements about the purity of plaintiff's beer product. The banners in question are two 20 foot by 5 foot signs that read: in 12-inch letters "*Budweiser* HAS RATS"; in 6-inch letters "IN THEIR BREWERY"; and in 5-inch letters "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S."

Upon consideration of the moving papers and the applicability of *San Antonio Com. Hosp. V. So. Cal. Dist. Carpenters,* No. 96-56124 slip op. 11497 (9th Cir. Sept. 8, 1997) (*withdrawing and replacing* opinion of June 4, 1997, at 115 F.3d 685), the Court issues a preliminary injunction against Defendant in the above-entitled action.

BACKGROUND

Defendant, Carpenter's Local 209 (hereinafter, "Union") is involved in a dispute with H.M.S., a contractor who employs two or three workers at Anheuser-Busch's Van

Nuys brewery. Budweiser replaced a union contractor with H.M.S. On August 5, 1997 the Union began displaying the two banners.

In August, Plaintiff sought and obtained a state court injunction prohibiting certain violent picketing activities, but failed to get an injunction to prohibit display of the banners. The Los Angeles Superior Court found that the word "rats" is subject to two meanings, one of which is a crude reference to the brewery and management. The court concluded that to "enjoin such free speech would be inappropriate under the circumstances."

On September 4, 1997, Plaintiff filed an Ex Parte Application for a Temporary Restraining Order in this Court, based on claims of infringement and dilution under the Lanham Act and fraud. On September 10, 1997, after careful review of the application and Defendant's Opposition, the Court concluded that jurisdiction is proper and issued a narrowly tailored temporary restraining order. The order halted Defendant's activities that violate the Lanham Act or constitute fraud.

DISCUSSION

I. Standard of Review

To prevail on a request for preliminary injunctive relief, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardship tips sharply in its favor. *United States v. Odessa Union Warehouse Co-op,* 833 F.2d 172, 174 (9th Cir. 1987).

II. Jurisdiction

This action presents claims under the Trademark Laws of the United States, 15 U.S.C. §§ 1051-1127 and for common law fraud. This Court has jurisdiction under 28 U.S.C. § 1338. The state law fraud claim arises out of a

common set of legally operative facts and is properly pendant on the federal claims under 28 U.S.C. § 1367.

III. Norris-LaGuardia Act

A crucial issue before the Court is whether the Norris-LaGuardia Act (NLA) applies in this situation and if so, whether Plaintiff satisfied the requirements of the NLA.

NLA is an anti-injunction statute that prevents district courts from issuing any TRO or injunction "in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act." 29 U.S.C. § 101; *see San Antonio* at 11504. The NLA denies district courts jurisdiction to prevent union members from publicizing the existence of, or the **facts** involved in a labor dispute by any method **not involving fraud**. 29 U.S.C. § 104(e) (emphasis added).

In *San Antonio,* a case strikingly similar to the present one, a Ninth Circuit panel upheld a preliminary injunction issued by Judge Takasugi of the Central District. There, a local of the same union in the present case displayed in front of a maternity ward at a hospital, a sign stating in 12-inch letters, "This medical facility is full of rats" and in five inch letters "Carpenters L.U. 1506 has a dispute with Best Int. for failing to pay prevailing wages to its workers." Slip op. at 11501. Judge Takasugi found the banner deceptive and fraudulent, and issued an injunction in accordance with the strict procedural requirements of the Norris-LaGuardia Act (NLA).

Here, Defendants are not advertising facts; they are advertising falsehoods and their methods involve fraud. The parties' declarations establish that the brewery has no rodent infestation. Contrary to Plaintiff's reading of the case, *San Antonio* held that NLA governed that case even though the union's banner was fraudulent speech. *Id.* at 11504. It is clear that the Ninth Circuit intended NLA to apply, because their opinion goes on to analyze all six factors required for an injunction. Thus, NLA applies equally in the present case.

In addition to proof of fraud, the Ninth Circuit requires a district court to find the following facts to issue an injunction in any case "involving or growing out of a labor dispute." *Id.*; 29 U.S.C. § 107.

1) The unlawful acts have been threatened and will be committed unless restrained. 29 U.S.C. § 107(a). Defendants displayed their poster intermittently over the course of a month. The declarations of the parties and proffered testimony establish this element.

2) Substantial and irreparable injury will follow. 29 U.S.C. § 107(b). Plaintiff holds federally registered trademarks numbered 922,481 and 952,277 for its Budweiser brand products. Plaintiff extensively markets that brand throughout the United States. False statements regarding the purity of Plaintiff's consumable products will improperly destroy brand loyalty developed through extensive and continuous marketing campaigns.

In *San Antonio,* the trial court found irreparable injury. The Ninth Circuit discussed calculation of the damage from the rat banner, but concluded that it was impossible to measure. *Id.* The impossibility of quantifying harm is precisely why the Lanham Act provides injunctive remedies. 15 U.S.C. § 1116(a). Irreparable injury ordinarily follows when a business' reputation, the strength of their mark, and the intangible value of the mark are put in jeopardy. *Koppers Co., Inc. v. Krupp-Koppers GmbH,* 517 F.Supp. 836 (D.C.Pa. 1981). This is such a case.

3) The denial of relief would cause greater injury to the Plaintiff than granting the injunction will cause to the Defendant. 29 U.S.C. § 107(c). Here, Plaintiff suffers substantial harm, and an injunction would only cause slight inconvenience and insubstantial economic cost to Defendant. The cost to produce Defendant's existing banners and replacement banners is minimal.

4) Defendant has no adequate remedy at law. 29 U.S.C. § 107(d). Lanham Act cases are eligible for injunctions, damages, profits, and destruction of the infringing item.

Injunctive relief is the remedy of choice for trademark cases because there is no adequate remedy at law for continuing infringement. Lanham Act, 15 U.S.C. § 1116(a); *Century 21 Real Estate Corp. V. Sandlin,* 846 F.2d 1175 (9th Cir. 1988).

5) Public officers are unable or unwilling to provide adequate protection to Plaintiff. 29 U.S.C. § 107(e). Law enforcement and other public officials generally do not apprehend commercial tortfeasors. *See, e.g., San Antonio* at 11513. This Court finds that, as a matter of public policy, public officials do not provide this type of enforcement, absent court action. Plaintiff did provide notice to the Los Angeles Police Department, Labor Relations Division prior to the injunction hearing.

6) The proponent of the injunction has made every reasonable effort to settle the dispute. 29 U.S.C. § 108. Plaintiff is not a party to this dispute and lacks the ability to resolve the underlying dispute, even if it desired to do so. Anheuser-Busch is merely a secondary player in the labor dispute, because the Union's dispute is with H.M.S. Defendant's sign purports to advertise a dispute with H.M.S., but disparages Plaintiff's products.

This Court held a hearing on this matter on September 15, 1997. The parties addressed the applicability of Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq., and satisfaction of requirements therein, as necessary. The parties submitted declarations of proposed testimony immediately prior to the hearing. All of the proposed testimony related to perception of the sign and inferences drawn from the terms therein. The Court found no disagreement between the parties as to the underlying facts and the parties filed materially identical photographic exhibits depicting the banners. The Court's findings of fact and the documentary evidence submitted by the parties rendered the proposed live testimony cumulative.

Accordingly, this court finds facts sufficient that the NLA does not deprive this Court of jurisdiction. 29 U.S.C. § 107.

IV. Lanham Act and Fraud Claims

Factual Issues: From careful review of the photographic exhibits showing the banner, and reading with the declarations of the parties, the Court agrees with the Ninth Circuit and Judge Takasugi's ruling in *San Antonio*, and finds the banners deceptive. Notably, in *San Antonio*, after the injunction, the union changed the sign and Judge Takasugi found that it was no longer deceptive. Slip Op. at 11513.

The Union uses the term "rat" primarily to disparage plaintiff's product and drive away potential customers. The contention that most observers would read the "rat" sign and think of a labor dispute is disingenuous.

Likewise, the "Budweiser" trademark on the poster would not confuse a reasonable person to think that Anheuser-Busch endorses this banner or that Plaintiff is advertising a rodent problem. Therefore, the Court finds no likelihood of confusion regarding Plaintiff's trademark.

Legal Issues: The Lanham Act, 15 U.S.C. § 1114(a) requires that a party claiming infringement show a likelihood of confusion as to source, origin, or sponsorship to be entitle to relief. Because the Court finds no such likelihood, Plaintiff's claim for infringement would fail.

Section 43(C) of the Lanham Act provides for injunctive relief to prevent dilution of the distinctiveness of famous marks, regardless of any confusion. 15 U.S.C. 1125. A party establishes a dilution claim by showing a likelihood of injury to business reputation or a lessening of the capacity for the mark to distingiush goods or services. *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d. 1446 (9th Cir. 1991). As discussed above, Plaintiff adequately proved the threat injury to his trademark.

Plaintiff has shown probable success on the merits of the claims for fraud and dilution. Success on the infringement claim is unlikely.

ORDER

It is hereby ordered that Defendant and all persons acting by, through and in concert with them are enjoined from engaging in the following acts at or about Plaintiff's Van Nuys production facility: using Plaintiff's registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem. Defendants are hereby enjoined from using the term "Rats" as they recently have in their banner display in front of Plaintiff's facility.

Defendants are free to publicize and advertising with blunt, intemperate, abusive, insulting, or imprecatory language, the existence of and truthful facts involved in their labor dispute.

IT IS SO ORDERED.

DATED: September 17, 1997

/s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

APPENDIX D

[Filed Sep. 10, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-97-6419 JMI (JGx)

ANHEUSER-BUSCH, INC.,
Plaintiff,

v.

CARPENTERS LOCAL 209, AFL-CIO,
Defendants.

ORDER GRANTING TEMPORARY
RESTRAINING ORDER

ODER SETTING HEARING ON
PRELIMINARY INJUNCTION
MONDAY, SEPTEMBER 15, 1997

IT IS HEREBY ORDERED:

The Court is in receipt of Plaintiff ANHEUSER-BUSCH, INC.'s *Ex Parte* Application for a Temporary Restraining Order ("TRO"), filed September 4, 1997 and Defendant CARPENTERS LOCAL 209, AFL-CIO's opposition filed September 8, 1997. Upon review and consideration of the moving papers, and the applicability of *San Antonio Com. Hosp. V. So. Cal. Dist. Carpenters,* 115 F.3d 685 (9th Cir. 1997) the Court ISSUES a TRO against Defendant in the above-filed action.

It is hereby ordered that Defendant and all persons acting by, through and in concert with said party are

BEST AVAILA

restrained and enjoined from engaging in the following acts at or about Plaintiff's Van Nuys production facility: using Plaintiff's registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem.

Defendants are hereby enjoined from using the term "Rats" as they currently have in their banner display in front of Plaintiff's facility.

The Court will hear oral argument on the merits of this matter on *Monday, September 15, 1997 at 1:30 p.m.* The parties may address the applicability of Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq., and satisfaction of requirements therein, if necessary.

This order is effective upon Plaintiff's filing an undertaking of security in the sum of $10,000.

IT IS SO ORDERED.

DATED: September 10, 1997

/s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-56124

D.C. No. CV-96-04830-RMT

SAN ANTONIO COMMUNITY HOSPITAL,
Plaintiff-Appellee,

v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF CARPENTERS, an unincorporated association;
CARPENTERS LOCAL 1506, an unincorporated association;
DOES 1 THROUGH 100,
Defendants-Appellants.

ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
March 3, 1997—Pasadena, California

Filed September 8, 1997

Before: Jerome Farris, Alex Kozinski, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson; Dissent by Judge Kozinski

ORDER

The opinion filed June 4, 1997, slip op. 6439, is hereby WITHDRAWN.

OPINION

T.G. NELSON, Circuit Judge:

Southern California District Council of Carpenters ("the Union") appeals the district court's issuance of a preliminary injunction restricting the manner in which the Union had displayed a banner purporting to publicize its labor dispute with Best Interiors, a subcontractor engaged in a construction project at San Antonio Community Hospital ("the Hospital"). The district court concluded that the Hospital had met the strict requirements for a preliminary injunction set forth in the Norris-LaGuardia Act ("NLA"), 28 U.S.C. §§ 101-115. We have jurisdiction under 28 U.S.C. § 1292(a). We affirm.

I. FACTS

The Union is currently engaged in an ongoing labor dispute with Best Interiors, a construction company, over Best Interiors' failure to pay its employees prevailing wages and benefits. Best Interiors is a subcontractor in an expansion project at the Hospital. There is no contract between Best Interiors and the Hospital. The Union concedes that it does not now have, and has never had, a labor dispute with the Hospital.

On June 21, 1996, the Union began displaying a banner near the Hospital's construction site and the entrance to the Hospital's maternity ward that was visible by passersby driving on San Bernardino Road in front of the Hospital and patients entering the maternity ward. The banner is displayed during the morning hours and is held by three retired members of the Union. In twelve-inch red capital

letters on two lines, the banner reads: "THIS MEDICAL FACILITY IS FULL OF RATS." Below those lines in five-inch red capital letters on two lines that appear just above the feet of the banner's holders, it reads: "CARPENTERS L.U. 1506 HAS A DISPUTE WITH [ ] FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS." In the blank space, in two-inch black handwritten letters, the banner reads: "Best Int." [1]

On June 25, 1996, the Hospital filed unfair labor practice charges against the Union with the National Labor Relations Board ("NLRB"). During the NLRB investigation, there were several attempts to reach a negotiated agreement between the Union and the Hospital. After completing its investigation, the NLRB Regional Office determined that evidence could not support the Hospital's allegations, and the Hospital withdrew its charges.

On July 11, 1996, the Hospital filed this lawsuit in the district court, including various state tort claims and a federal claim for an unlawful secondary boycott under 29 U.S.C. § 187. On July 17, 1996, the Hospital filed a motion for a temporary restraining order which the district court denied on July 22, 1996, because the Hospital had failed to satisfy the requirements of the NLA.

On August 9, 1996, the district court held an evidentiary hearing on the Hospital's request for a preliminary injunction. After hearing the testimony of witnesses from both sides, the district court ruled that the Hospital had met the requirements for a preliminary injunction set forth in the NLA. The district court ordered that the Union's members "are hereby preliminarily enjoined from using the term, 'Rats,' as they currently have in their

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[1] At about the time the Union began displaying the banner, the banner's holders also began distributing a handbill to interested pedestrians which explained that "[a] rat is a contractor that does not pay all of its employees prevailing wages or provide health and pension benefits to all of its employees."

banner which they display in front of plaintiff San Antonio Community Hospital." This timely appeal followed.

II. DISCUSSION

Generally, the grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). *See also Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 45 (8th Cir. 1946) ("Since we conclude that the trial courts' findings against the appellants in this case on issues necessary to its power and jurisdiction to enjoin the appellees [under the NLA] are not clearly erroneous, the decree appealed from is affirmed."); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615 (8th Cir. 1941). However, when a case involves free expression, "[w]e must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974) (citations omitted). "While this duty has been most often recognized in the context of claims that the expression involved was entitled to First Amendment protection, the same obligation exists in cases involving speech claimed to be protected under federal labor laws." *Id.* We review issues of law underlying the district court's grant of a preliminary injunction *de novo*. *Chandler*, 83 F.3d at 152.

A. *Injunctions and the Norris-LaGuardia Act*

Under traditional legal standards, a moving party may become eligible to obtain a preliminary injunction by demonstrating "a combination of probable success on the

merits and the possibility of irreparable injury." *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987). At the very least, "it must be shown as an irreducible minimum that there is a fair chance of success on the merits." *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994).

The NLA is an anti-injunction statute that prevents district courts from issuing "any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act." 29 U.S.C. § 101. The NLA denies jurisdiction to district courts to issue preliminary injunctions that would prevent union members from "[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method *not involving fraud or violence.*" 29 U.S.C. § 104(e) (emphasis added).

Therefore, in addition to satisfying the traditional requirements for a preliminary injunction and providing evidence of fraud or violence, the Hospital, as proponent of the preliminary injunction, was required to prove the following additional elements:

> 1) That unlawful acts have been threatened and will be committed unless restrained (29 U.S.C. § 107(a));
>
> 2) That substantial and irreparable injury to the Hospital's property will follow (29 U.S.C. § 107(b));[2]
>
> 3) That greater injury will be inflicted upon the Hospital by the denial of relief than will be inflicted upon the Union by the granting of relief (29 U.S.C. § 107(c));
>
> 4) That the Hospital has no adequate remedy at law (29 U.S.C. § 107(d));

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[2] This element duplicates the irreparable injury requirement under the traditional analysis.

5) That the public officers charged with the duty to protect the Hospital's property are unable or unwilling to furnish adequate protection (29 U.S.C. § 107(e)); and

6) That the Hospital has made every reasonable effort to settle the dispute (29 U.S.C. § 108).

Because the Union challenges the district court's conclusions with regard to all of these elements, we will address each element in turn.[3]

1. *Fraud and Unlawful Acts*

In addition to satisfying the strict requirements of the NLA, the Hospital must demonstrate "a fair chance of success on the merits." On the merits of what? Of one of the Hospital's substantive claims. The Hospital's complaint contained six damages claims: libel, trade libel, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, interference with contractual rights, and secondary boycott under section 303 of the Labor Management Relations Act ("LMRA") (29 U.S.C. § 187). Four of the six claims cannot form the basis for injunctive relief.

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[3] In its order granting the Hospital's motion for a preliminary injunction, the district court did not explicitly address the traditional "fair chance of success on the merits" elements, but did note that it had "considered the pleadings and other documents filed herein" in making its ruling. Though the Union offered only a cursory analysis of this element in its opposition to the Hospital's motion, it did state that "HOSPITAL has not shown that it has a substantial chance or success on the merits of its common law claims." (See Union's Memorandum of Opposition filed July 18, 1996, at pg. 15.) The Union's argument on this point is even less clear on appeal, and is formulated as an argument that the Hospital's state law claims are "preempted" because the banner is "literally and factually true." (Blue 25-27.) Though the question is close, we conclude that the Union has not waived its objection to the traditional "fair chance of success" requirement for a preliminary injunction, and we will therefore decide the issue.

The interference with prospective economic advantage and contractual rights claims are preempted by section 303 of the LMRA. *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260-61 (1964). And an employer cannot seek injunctive relief from a secondary boycott under section 303; only damages are available. *Burlington Northern R.R. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 448 (1987) (because the NLRB has exclusive authority to seek injunctions under the National Labor Relations Act, "employers are not permitted to obtain injunctions of secondary activity."); *California Ass'n of Employers v. Building and Constr. Trades Council of Reno*, 178 F.2d 175, 178 (9th Cir. 1949) ("The [LMRA] did not give private litigants the right to obtain injunctive relief even in those situations where a suit for damages was allowed."). That leaves the Hospital's defamation claims as the only possible basis for the preliminary injunction.

Because the injunction must be predicated on the Hospital's defamation claims, the Supreme Court's decisions in *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966), and *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974), come into play. These cases stand for the general proposition that "libel actions under state law [are] preempted by the federal labor laws to the extent that the State [seeks] to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." *Letter Carriers*, 418 U.S. at 273. We thus must decide whether the Hospital satisfactorily demonstrated a reasonable chance of meeting this standard at trial, commonly known as the *New York Times* "actual malice" standard. *See New York Times Co. v. Sullivan*, 418 U.S. 254 (1964). We hold that it did.

The Union disputes the district court's finding that the language contained on the banner is fraudulent. The

Union argues that the term "rat" has deep historical meaning in the context of labor disputes and should not be subject to injunction The Union contends that it was merely publicizing the facts of its labor dispute and its opinion that Best Interiors was a "rat contractor" for failing to pay its workers the prevailing wage. The district court concluded, however, that the *manner* in which the term "rat" was used on the banner was deceptive and misled "all persons exposed" to the banner "into believing that the banner is stating that plaintiff Hospital has a rodent problem."

The Union is correct that the NLA allows unions a great deal of latitude in their choice of language in the context of a labor dispute. The Supreme Court has noted that "labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn*, 383 U.S. at 58 (citation omitted). The Court has also noted that "federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Letter Carriers*, 418 U.S. at 283. The license to use inflammatory rhetoric during a labor dispute, however, is not unbridled under the NLA. Where, as here, a union's fraudulent language is directed at an entity with which no labor dispute exists, the NLA does not prevent a district court from exercising jurisdiction to issue an injunction prohibiting the fraudulent activity. *See Donnelly*, 154 F.2d at 45 ("[N]othing in the Norris-LaGuardia Act denies to the Federal courts the power to issue an injunction in an action growing out of a labor dispute where the evidence clearly establishes the requisite jurisdictional findings. Fraud and violence are as unlawful and as reprehensible in a labor controversy as elsewhere.").

The most natural reading of the Union's statement "THIS MEDICAL FACILITY IS FULL OF RATS" is that the Hospital has a rodent problem. This, the Union

concedes, is not true, nor has the Union ever believed it to be true. The Union argues, however, that the term "rat" has deep historical meaning in the context of labor disputes. Most dictionaries, the Union points out, define "rat" not only as a type of rodent, but also as an employer who fails to pay prevailing wages or a worker who works for substandard wages. Because Best Interiors was not paying its workers prevailing wages, the Union argues that its statement was both "literally and factually" true—the Hospital *was* "full of rats."

The Union relies heavily on the Supreme Court's conclusion in *Letter Carriers* regarding a union's use of the word "scab." There, the Court explained:

> It should be clear that the newsletter's use of the epithet "scab" was protected under federal law and cannot be the basis of a state libel judgment. Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true. One of the generally accepted definitions of "scab" is 'one who refuses to join a union," Webster's Third New International Dictionary (unabridged ed. 1961), and it is undisputed that the appellees had in fact refused to join the Branch.

Letter Carriers, 418 U.S. at 282-83. But the distinction between the union's use of the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" in this case is patent. Nobody would have understood the union in *Letter Carriers* to be referring to the non-union workers as "crust[s] of hardened blood and serum over a wound," or "scabies of domestic animals." *See* Webster's New Collegiate Dictionary 1021 (defining "scab"). By contrast, the manner in which the Union used the term "rat" on its banner could cause most—if not all—readers to be misled into believing that the banner meant that the Hospital had a rodent problem. This is not true.

The same distinction can be drawn with regard to the other cases cited by the Union. In *Beverly Hills Food-*

land, Inc. v. United Food & Commercial Worker's Union, 840 F.Supp. 697, 705 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994), the court ruled that a union handbill entitled "Don't Help Feed the Rat" identifying Foodland as a "rat employer" was protected by federal labor law because the handbill's use of the word "rat" could not be construed as a misrepresentation of fact. "No one could read the handbill," the court explained, "and believe that the owner/manager of Foodland was actually a rodent animal." *Id.* at 705.

Likewise, in *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995), the court noted that it was not improper for a trade union publication to urge "solidarity" against BE & K and describe the company as a " 'rat' contractor." *Id.* at 1463. Again, in this context, the use of the term "rat" to describe the management side of the labor dispute was not deceptive or designed to mislead members of the general public. No reasonable reader would have believed, based on the newsletter, that the contractor was actually a four-legged rat. The same cannot be said in this case.

The problem with the use of the term "rats" in this case was not the mere use of the term, but the manner in which it was used. The district court found a high probability that members of the public would be and actually were deceived by the Union's use of the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" in the banner. Based on our independent review of the record, we agree. The banner states in prominent lettering "THIS MEDICAL FACILITY IS FULL OF RATS." At no place in that phrase or in the entire banner does the Union identify Best Interiors as the "rat contractor." The term "rats" is directed at the Hospital, not the contractor with whom the Union has the labor dispute. The allegedly explanatory language on the banner is in letters less than half the size of the first statement and is located at the bottom of the banner just above the feet of the individuals holding it.

The words "Best Int." identifying the disputed contractor are smaller still, handwritten, and, as a result, difficult to read at best by drivers passing on San Bernardino Road.[4] The cases cited by the Union do not undercut the district court's conclusion that the manner in which that term was used in the chosen context was fraudulent, deceptive, and intended to mislead members of the general public into believing that the Hospital suffered from a sanitation problem.

We agree that "[e]xpressions of opinion, though inaccurate and even misrepresentative in character, obviously cannot be permitted to be made the basis ordinarily for injunctive process in a labor dispute." *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 616 (8th Cir. 1941). We also agree that "[a]ccusations of unfairness against an employer normally will fall within this category" of opinion. *Id.* But in this case, the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" cannot be construed as an opinion. It certainly is designed to grab the reader's attention, but only because it purports to be an expression of fact which, if true, would deter reasonable people from seeking medical care at the Hospital. The NLA was intended

> to leave the federal courts free to enjoin those permeative acts, falling within the term "fraud or violence," which an unsluggish public conscience and a healthy social order cannot soundly tolerate, even at the risk

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[4] The size of the lettering used by the Union is a factor in the determination of whether or not the Union's message was deceptive. In *NLRB v. San Francisco Typographical Union No. 21*, 465 F.2d 53 (9th Cir. 1972), the union picketed a neutral party with the object of persuading consumers not to purchase a certain "struck product." The NLRB determined that "the picket signs did not adequately identify the struck products, because such advertisements were too difficult for shoppers to read," and we held that "the union must accept the burden of properly identifying the [target of the strike]." *Id.* at 56.

> of thereby enabling one of the parties to tip the scales of the fundamental dispute.

Id. at 617. The language on the Union's banner crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact. *See Mercy Health Servs. v. 1199 Health and Human Serv. Employees Union*, 888 F. Supp. 828 (W.D. Mich. 1995) (holding television commercials "defamatory because they attempt to frighten Michigan residents into believing that [Mercy's hospitals] cannot deliver adequate care and comfort"). As in *Peel v. Attorney Regisration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 107 n.14 (1990), the "legal question" in this case "is whether a statement of . . . fact is nonetheless so misleading that it falls beyond the First Amendment's protections." The Union's assertion that the Hospital was full of rats is such a statement. On this evidentiary record, the Union's banner is fraudulent, there is a reasonable probability that the Hospital can successfully prove "actual malice," and the NLA did not deprive the district court of jurisdiction to enjoin the banner's display.

2. *Irreparable Injury and No Adequate Legal Remedy*

The district court heard evidence from several of the Hospital's employees that they spent a portion of their time explaining to patients and other employees that the Hospital was not actually infested with rodents. Though there is no indication that patients and Hospital employees remained confused and misled after they were told that the Hospital was not actually suffering from sanitation problems, the time spent by Hospital employees explaining the nature of the labor dispute and reassuring patients was time taken away from their ordinary administrative and medical care duties.

The Hospital also introduced evidence that its reputation and, consequently, its fund-raising ability had been impaired since the Union began displaying the fraudulent

banner. Potential contributors were less likely to donate funds to the Hospital if they believed the facility was actually infested with vermin and maintained unsanitary conditions. As another court recently noted: "The reputation of a hospital is difficult to restore once it has been tainted." *Mercy Health Servs.*, 888 F. Supp. at 838. We agree.

Finally, it is impossible to measure the number of potential patients who were deterred from seeking medical care at the Hospital due to their misunderstanding of the Union's banner because they are not available to be counted. Because the banner was located directly in front of the entrance to the Hospital's maternity ward, however, evidence from employees who worked in that area provided one reasonable measurement of the deterrence caused by the Union's conduct, demonstrating a statistically significant drop in maternity patients. Cathy Knittle, an Assistant Director of Business Services at the Hospital and the person in charge of the department responsible for admissions to the Hospital, testified that maternity preadmissions, a method of early registration for expectant mothers, had dropped by 200 patients per month since the Union began displaying the banner. This drop in maternity preadmissions is not insignificant.[5] The district court concluded that the Hospital suffered irreparable injury as a result of the Union's fraudulent activity and had no adequate legal remedy to redress the harm caused. Based on our review of the record, we agree.

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[5] The dissent faults our reliance on Ms. Knittle's testimony, calling it "not sufficient" evidence of substantial and irreparable injury. See dissenting op., at 11516. Had this been the only evidence of injury the Hospital presented to the district court, we might agree. However, the dissent overlooks the additional evidence presented by several Hospital employees regarding lost administrative time and damage to the Hospital's reputation and fund-raising ability. Taken together, this is sufficient evidence of substantial and irreparable injury.

3. *Balancing the Hardships*

The Hospital provided substantial evidence regarding the injury it sustained as a result of the Union's fraudulent conduct. The burden to the Union of clarifying its banner, however, is slight in light of the narrowness of the district court's injunction. Shortly after the district court issued its injunction in this case, the Union began displaying a second banner with twelve-inch red capital lettering alongside the first banner which reads: "BEST INTERIORS IS THE RAT CONTRACTOR." The Hospital filed an *ex parte* application to the district court, asking for a contempt citation, but the district court ruled that the injunction had not been violated because the Union had clarified the misleading nature of the term "rats." Due to the narrow scope of the district court's injunction and the ease with which the Union complied with its requirements, the Union has been burdened only slightly at best as a result of the injunction.

4. *Local Police*

The Hospital introduced evidence that administrators at the Hospital had contacted the local police department and were told that the police were unable to do anything about the banner. The Union contends that this testimony was hearsay and therefore inadmissible. The district court did not sustain the Union's objection, however, which was not raised until the end of the witness's direct examination. Therefore, the evidence was properly admitted and the untimely objection was waived.[6]

5. *Efforts to Settle the Dispute*

The Union argues in a footnote near the end of its opening brief that the Hospital introduced insufficient evidence

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[6] The Union also argues, for the first time on appeal, that the Hospital did not give the police department advance notice of the preliminary injunction hearing, as it is required to do by 29 U.S.C. § 107(e). This is incorrect. The Hospital served notice of the hearing to Chief Martin Thouvenell via Federal Express at least seven days before the hearing.

"to establish that it engaged in all reasonable efforts to settle the matter before seeking injunctive relief." At the evidentiary hearing, however, the Hospital introduced evidence that it had engaged the Union on a number of occasions in an effort to resolve this dispute before seeking an injunction. There is sufficient evidence in the record to support the district court's conclusion that the Hospital satisfied this element.

We emphasize the narrowness of our decision. The Union displayed a banner in front of the Hospital that included a prominent declaratory statement of fact which was so misleading as to be fraudulent. The NLA generally prohibits federal courts from issuing injunctions in labor disputes, but when a union engages in fraudulent activity, the Act does not deprive a court of the power to enjoin it. The district court in this case carefully crafted a narrow injunction that prohibited the fraudulent manner in which the Union used the term "rats," but did not prohibit the use of the term itself. The Hospital presented evidence to the district court that has convinced us that the strict requirements of the NLA are satisfied. As a result, the district court did not err in issuing a narrowly tailored preliminary injunction to prevent the Union from using the term "rats" in a fraudulent manner.

B. *Prior Restraint*

The Union argues that the district court's preliminary injunction amounts to an unconstitutional prior restraint on speech. This issue, however, is rendered moot by our resolution of the district court's jurisdiction under the NLA. We concluded above that the district court correctly found that the Union's display of the banner was fraudulent. The First Amendment does not protect fraud. *See Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 107 n.14 (1990); *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995). As the California Supreme Court has noted: "The policy of this state which

characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech." *Magill Bros., Inc. v. Building Serv. Employees' Int'l Union*, 127 P.2d 542, 545 (Cal. 1942) (citing *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940)). We agree.

III. CONCLUSION

After considering the entire evidentiary record and all of the Union's arguments on appeal, we conclude that the district court did not abuse its discretion in issuing its narrowly tailored preliminary injunction prohibiting the Union's fraudulent activity because the Hospital satisfied the strict requirements of the Norris-LaGuardia Act. We therefore AFFIRM.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

Those who would enjoin speech concerning a mtter of public interest must bear a heavy burden, *see Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971) ("heavy presumpion" of unconstitutionality), more so if the speech in question concerns a labor dispute. *See* Norris-LaGuardia Act, 29 U.S.C. § 104(e) (prohibiting injunctions of labor speech unless "involving fraud or violence"); *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, 369 (1960) ("[The NLA's] language is broad because Congress was intent upon taking the federal courts out of the labor injunction business . . . .").[1]

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[1] The banner here was used in prosecuting a labor dispute, and "rats" is a term of art which conveys a specific, nondefamatory meaning in that context. *See* maj. op. at 12144. In addition to rodents and police informants, the term refers both to contractors who pay less than the prevailing wage and to workers who accept such a wage. *See 2 The Compact Edition of the Oxford English Dictionary* 2418 (1st ed., 24 prtg. 1985); *Webster's Third New International Dictionary* 1884 (1981).

The Hospital here did not carry its burden of showing it will suffer a "substantial and irreparable injury." *See* 29 U.S.C. § 107(b). It's implausible to believe that anyone choosing what hospital to patronize, or whether to donate money, would make such a weighty decision on the basis of a fleeting glance at a picket sign during a drive-by. People ain't that dumb; they would investigate and discover the truth.[2] There is no proof that a single person was deterred by the sign from using the hospital or donating money—not a one. The evidence about the decline in maternity ward admissions is not sufficient, as there was no connection—temporal or otherwise—to the union's picketing; the decline started in April, but the sign didn't go up until late June.[3] Either there were a lot of clairvoy-

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[2] The truth here would have been easy to find as the union was passing out flyers explaining that "[a] rat is a contractor that does not pay all of its employes prevailing wages or provide health and pension benefits to all of its employees." As well, prospective patients or donors could have asked—and in fact did ask—hospital personnel for clarification.

[3] The decline was calculated based on a comparison between 1600 admissions in March 1996 and 1400 at the time of evidentiary hearing on August 9, 1996. The banner first went up on June 21, 1996 —almost three months after the benchmark date.

The *entire* record on the decline is the following testimony by the Hospital's Assistant Director of Business Services:

DIRECT EXAMINATION

Q. Since the banner has been up, have you noticed a decline of the number of preadmits to the Maternity Department?

A. Yes.

. . . .

I receive daily reports, and we are approximately 200 maternity patients.

Q. Downwards?

A. Yes.

CROSS-EXAMINATION

Q. And you say that statistically your report shows that the number of maternity patients has declined 200 over what, the month before or what, over what standard?

[Continued]

ant (but gullible) expectant mothers in Upland, California, or the decline had nothing to do with the union's banner.

This may not seem like a big deal. Who, after all, can object to forcing the union to change its banner so as to avoid even a small risk of deceiving the public? But ambiguity and flamboyance are often at the heart of political expression. Who, for example, can forget "Where's the Beef" from the 1984 Presidential campaign? But what if Senator Mondale been forced to say: "Where's the substance?" No one would have noticed or remembered.

So too with rats. Changing the sign may make it clearer, may avoid the smallest risk of confusion, but it saps the message of its vigor. *See Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers* v. *Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" in a defiition of a union "scab" not the basis for a defamation action since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, lusty and imaginative expression of the contempt felt by union members"). I don't believe courts are equipped—or even permitted—to evaluate such tradeoffs. Because the sign here was literally true, within an accepted meaning of the word used, I would quash the injunction and let the parties work out their differences in the marketplace—and in the marketplace of ideas.

* * * *

The majority now explains that the wrong the preliminary injunction was designed to prevent is a defamation covered by *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). From bad to worse: Not only is this the first case to affirm a labor injunction, it is the first ever (so far as I am aware) to uphold a preliminary injunction against

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[3] [Continued]

A. Statistically up until about March we had 1600 preadmits per month. We are down to 1400.

E.R. tab 11, at 77-79.

speech covered by *Sullivan*.[4] Because *Sullivan* speech always involves matters of public interest, I had assumed that damages after trial on the merits is the high water mark of available relief. An interlocutory injunction based on a "reasonable probability" of malice, maj. op. a 12153, is, by hypothesis, not based on "actual malice." *See* 376 U.S. at 279-80. Since labor speech enjoys even greater protection than ordinary speech, today's opinion will provide plausible support to those who seek prior restraints against allegedly defamatory newspaper and magazine articles, as well as television programs, plays and movies. Indeed, given the wafer-thin defamation claim here, and the paltry evidence of irreparable harm, getting a preliminary injunction against speech offensive to public officials and other VIPs may not be all that hard.

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[4] I know of only one other published opinion where such an injunction has even been issued, *Mercy Health Services* v. *1199 Health & Human Service Employees Union*, 888 F. Supp. 828 (1995). This case involved, perhaps not coincidentally, a labor dispute at a hospital.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-56124
D.C. No. CV-96-04830-RMT

SAN ANTONIO COMMUNITY HOSPITAL,
Plaintiff-Appellee,
v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF CARPENTERS, an unincorporated association;
CARPENTERS LOCAL 1506, an unincorporated association;
DOES 1 THROUGH 100,
Defendants-Appellants.

Filed February 17, 1998

Before: Jerome Farris, Alex Kozinski, and Thomas G. Nelson, Circuit Judges.

ORDER: Dissent by Judge Reinhardt

ORDER

Judges Farris and T.G. Nelson voted to deny the petition for rehearing. Judge Nelson votes to reject the suggestion for rehearing en banc, and Judge Farris so recommends. Judge Kozinski voted to grant the petition for rehearing and votes to accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

REINHARDT, Circit Judge, with whom Judges PREGERSON, KOZINSKI, and TASHIMA join, dissenting from the failure to rehear en banc:

Once again I am compelled to express my deep regret that this court has failed to exercise its responsibility to rehear a case en banc.[1] By refusing to review the divided panel opinion, we become not only the first circuit court in the 66-year history of the Norris-LaGuardia Act to uphold a preliminary injunction against peaceful labor speech on the basis that the content of the message constitutes "fraud," but also the first circuit court in the 34-year history of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to uphold an injunction against speech subject to the First Amendment's "actual malice" standard. I would have thought that such an opinion would have disturbed the "uniformity of our decisions" or "involv[ed] a question of exceptional importance." Fed. R. App. P. 35(a); Ninth Cir. Rule 35(a). Apparently not, in the view of a majority of our active judges.[2]

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[1] *See also, e.g., Rendish v. City of Tacoma*, No. 96-36150, —— F.3d ——, 1998 WL 24311 (9th Cir. 1998) (Reinhardt, J., dissenting from failure to rehear en banc).

[2] I use the term "majority" for convenience. Because it requires an affirmative vote of a majority of active judges to take a case en banc, and we now have an even number of active judges (18 out of our authorized 28), it is possible in any given case in which we failed to go en banc that we evenly divide. I am not allowed to disclose the actual vote in this or any other en banc matter.

This case required en banc rehearing to overrule two fundamental errors in the majority opinion: (1) its disregard for the previously unchallenged rule that federal judges may not issue injunctions that operate as prior restraints on peaceful labor speech; and (2) its erroneous holding that a "labor dispute" does not exist when a union pickets a "secondary" employer. The second error contravenes the plain language of the Norris-LaGuardia Act, repudiates a determination deliberately made by Congress when enacting that law, and specifically reaffirmed by Congress 15 years later when enacting the Taft-Hartley Act, and, to top it off, creates a direct intra-circuit conflict with *Smith's Mgmt. v. IBEW Local 357*, 737 F.2d 788 (9th Cir. 1984).

I

The majority found, without citing a single case involving free speech in the context of labor disputes, or a single case involving free speech covered by *New York Times v. Sullivan*, that because members of the public could misinterpret the Union's banner as stating that the Hospital had a rodent problem, the language on the banner was "so misleading that it falls beyond the First Amendment's protections." 125 F.3d 1230, 1237 (9th Cir. 1997) (quotation omitted).[3] On that basis, it upheld an *injunction* against the union speech. As Judge Kozinski's dissent convincingly demonstrates, however, this decision is directly contrary to law. 125 F.3d at 1239-40 (Kozinski, J., dissenting). I briefly add to my able colleague's cogent analysis only in order to highlight the fact that a long

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[3] The Union's banner, which it displayed near the Hospital's construction site, read:

THIS HOSPITAL IS FULL OF RATS.

CARPENTERS L.U. 1506 HAS A DISPUTE WITH [Best Int.] FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS.

The letters on the top line were 12 inches high, while the letters on the bottom lines were 5 inches high.

line of decisions by the federal courts leaves no doubt that the language on the banner falls well within the protections of the Norris-LaGuardia Act and the First Amendment—and that in no event can such speech be enjoined.

Because the Norris-LaGuadia Act's "fraud" exception is the same as the "actual malice" standard first enunciated in *New York Times v. Sullivan, see Linn v. Plant Guard Workers*, 383 U.S. 53, 58 (1965), the Supreme Court has made it perfectly clear that " 'the most repulsive [labor] speech enjoys immunity provided it falls short of deliberate or reckless untruth' " and, "[b]efore the test of reckless or knowing falsity can be met, *there must be a false statement of fact*." *Old Dominion Branch No. 49, Nat'l Ass'n of Letter Carriers*, 418 U.S. 264, 284 (1974) (quoting *Linn*, 383 U.S. at 63) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)) (emphasis added). Moreover, since "[l]abor disputes are ordinarily heated affairs, . . . frequently characterized by bitter and extreme exchanges, countercharge, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions," *Linn*, 383 U.S. at 58, "federal law gives a union license to use intemperate, abusive, or insulting language *without fear of restraint*." *Letter Carriers*, 418 U.S. at 283 (emphasis added).

The Court has been no less emphatic in applying this standard. It stated over 50 years ago, in reversing a state court injunction of union picketing, that "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or *'fascist'—is not to falsify facts*." *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (emphasis added). More recently, the Court held that a union's repeated references in newsletters to replacement workers as "scabs" "cannot be the basis of a state libel judgment"—let alone an injunction—because unions must be permitted to employ "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by

union members towards those who refuse to join." *Letter Carriers*, 418 U.S. at 282-83, 286.

Until the majority's opinion, federal courts had consistently come to the seemingly obvious conclusion that the Court's pronouncements applied equally to the word "rat," another commonplace term in labor disputes—a term that refers to replacement workers and their employers. *See BE & K Const. Co. v. NLRB*, 23 F.3d 1459, 1463 (8th Cir. 1994) (protecting union's right to urge boycott against "rat" contractor); *Beverly Hills Foodland, Inc. v. United Food & Commercial Worker's Union*, 840 F. Supp. 697, 705 (E.D. Mo. 1993) (holding that handbill outside grocery store entitled "Don't Help Feed the Rat" was protected speech), *aff'd*, 39 F.3d 191 (8th Cir. 1994). This judicial conclusion finds direct support in the dictionary as well. *See* 2 The New Shorter Oxford English Dictionary 2480 (4th ed. 1993) (defining "rat" as "[a] worker who refuses to join a strike or who takes a striker's place"); Webster's Third New International Dictionary 1884 (1981) (same).

Notwithstanding the unequivocal precedent protecting speech like that used in the Union's banner (and even protecting the very term involved), the two-judge majority erroneously concluded that "the Union's banner crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact," 125 F.3d at 1237. In holding that the Union's message was so far removed from the type of dialogue properly employed in labor disputes that it could be enjoined by a federal judge, the majority was plainly insensitive to the type of terminology long used in labor disputes and was simply wrong about the injunctive powers of the federal courts in the post Norris-LaGuardia era.

For starters, the banner used a well-established term and it stated the truth. It used the term "rats" in the precise manner the term is traditionally used in labor disputes and in the manner that the dictionary recognizes it

is used in such context. "Rats," contractors who are paying less than the prevailing wage and workers who are accepting such a wage, were "literally and factually" prevalent in the Hospital. That alone is enough to protect the speech from ordinary tort liability. *See Letter Carriers*, 418 U.S. at 283 (holding that usage of "scab" was protected because, as used in the labor context of the case, it was "literally and factually true"). It is far more than enough to protect it against a post-Norris-LaGuardia-Act injunction by federal judges. Moreover, the union's conduct was hardly recklessly misrepresentative. Lest any readers of the banner be confused by the meaning of the word "rats" in the banner's context, the word was immediately followed by the Union's name and an explanation that a labor dispute was occurring. And, just to be sure, union members were passing out flyers explaining that "[a] rat is a contractor that does not pay all of its employees prevailing wages or provide health and pension benefits to all of its employees." 125 F.3d at 1239 n.2. To read, as the majority did, the first sentence of the banner entirely out of context and conclude that it was recklessly "false" ignores entirely the context of circumstances in which speech must be understood. *See Ironworkers v. Pauly Jail Bldg. Co.*, 118 F.2d 615 (8th Cir. 1941) ("Expressions of opinion, though inaccurate and even misrepresentative in character, obviously cannot be permitted to be made the basis ordinarily for injunctive processes in a labor dispute"). Even worse, it quashes unions' well-established right to use "lusty and imaginative" words in a "loose, figurative," sense. *Letter Carriers*, 418 U.S. at 284. The majority opinion would certainly not permit or encourage "robust speech."

Only unprotected "*commercial speech*"—i.e., "[f]alse, deceptive, or misleading, *advertising*," *In re R.M.J.*, 455 U.S. 191, 200 (1982) (emphasis added)—has ever been subjected to prior restraint. But speech regarding labor disputes is *not* commercial speech. *DeBartolo Corp. v.*

Florida Gulf Coast Bldg & Const., 485 U.S. 586, 576 (1988). Judge Kozinski is correct, therefore, in stating that "damages after trial on the merits is the high water mark of available relief," 125 F.3d at 1240, for defamation claims involving speech covered by *New York Times v. Sullivan*. Speech that is subject to that doctrine is, for all practical purposes, not subject to injunctive relief. *See Near v. Minnesota*, 283 U.S. 697, 718-19 (1931) (stating, over thirty years before *New York Times v. Sullivan*, that prior restraints on allegedly defamatory speech relating to public figures offend "the deep-seated conviction that such restraints would violate constitutional right" and that, for this reason, public figures "find their remedies . . . in actions" for damages, "not in proceedings to restrain . . . publication"); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) (stating that the settled rule, save a narrow exception not relevant here, is that "equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages").[4] That is why, until today, no court

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[4] The opinion's attempt to find authority to the contrary fails completely. Because the Norris-LaGuardia Act standard and the *Sullivan* standard have been around for 65 and 33 years, respectively, there is certainly no dearth of cases explaining the bounds of their application. Yet neither of the only two federal cases the majority cites in its "prior restraint" section that purportedly supports its revolutionary endorsement of the issuance of a preliminary injunction prohibiting controversial speech, *see* 125 F.3d at 1239, involves speech covered by either doctrine. Nor does either case even involve the question of an injunction, preliminary or otherwise. The first case the majority cites, *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990), involves the Bar's attempt to discipline an attorney who engaged in commercial speech by advertising his services as a "specialist." Even though the *Peel* speech enjoys *less* First Amendment protection than labor speech, the Court found, despite the likelihood that it would be misunderstood by some members of the general public, that the attorney's speech was *protected*. 496 U.S. at 106-07 & n.14. The Bar did not seek injunctive relief. The second case the majority cites, *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995), serves it

has ever upheld an injunction prohibiting the type of speech at issue here.[5]

II

In its decision, the majority also stated, without citation to any authority, that "[w]here, as here, a union's fraudulent language is directed at an entity with which no labor dispute exists, the Norris-LaGuardia Act does not prevent district court from exercising its jurisdiction to issue an injunction prohibiting the fraudulent activity." 125 F.3d at 1235. Here, too, it is clearly wrong. There was indeed a "labor dispute" involving the hospital. In relying on the prohibited primary/secondary employer distinction in order to justify its affirmance of the injunction, the majority "commit[ted] precisely the error that prompted Congress to pass the [Norris-LaGuardia] Act," *Burlington No. R. Co. v. Maintenance Employees,* 481 U.S. 429, 442 (1987), totally ignored our decision in *Smith's Mgmt. v. IBEW Local 357,* 737 F.2d 788 (9th Cir.

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no better. It was a § 1983 suit for damages, and again no injunctive relief was sought. The "First Amendment" claim in that case was "one of vindictive prosecution" brought against police departments and officials for criminally charging the plaintiffs (under Colorado law) with lying in fund-raising efforts on behalf of their charity. *Id.* at 1534. The court affirmed a ruling of summary judgment in favor of the police on the ground of qualified immunity because the police "established that their conduct was objectively reasonable" and the plaintiffs failed to "produc[e] specific evidence" demonstrating an "unconstitutional motive" to burden legitimate solicitations. *Id.* at 1537.

[5] Even if the majority were somehow correct that the hospital had demonstrated a "reasonable probability," 125 F.3d at 1237, that the Union's banner was "deliberately and recklessly untru[e]," *Letter Carriers,* 418 U.S. at 284, such a finding could not justify imposing an injunction, preliminary or otherwise, on speech of this sort. "An interlocutory injunction based on a 'reasonable probability' of malice is, by hypothesis, not based on 'actual malice.'" *San Antonio Comm. Hosp.,* 125 F.3d at 1240 (Kozinski, J., dissenting).

1984), and contravened Congress' carefully crafted statutory scheme for dealing with "secondary boycotts."

There is no question that this case involves a "labor dispute" within the meaning of the Norris-LaGuardia Act. This court and the Supreme Court have stated in no uncertain terms that "in the Norris-LaGuardia Act, 'Congress abolished, for purposes of labor immunity, the distinction between primary activity involving the immediate disputants and secondary activity in which the employer disputants and the members of the union do not stand in the proximate relation of employer and employee.'" *Smith's Mgmt.*, 737 F.2d at 790 (quoting *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 623 (1967) (second internal quotation omitted)); *see also* 29 U.S.C. § 113(c) (defining labor dispute).[6] Indeed, in *Smith's Mgmt.* we held that a "labor dispute" existed where the circumstances were for all practical purposes identical to those present here. A supermarket hired a subcontractor that employed non-union labor to perform electrical work in the market. When the union distributed handbills outside the market in order to organize a secondary boycott of the market, the market obtained a preliminary injunction from the district court on secondary boycott grounds. This court forcefully vacated the injunction, holding that there was "no question" that a "labor dispute" could and did exist between the union and the supermarket within the meaning of the Norris-LaGuardia Act; that "the issuance of the injunction violated the Norris-LaGuardia Act;" and that the district court was without jurisdiction to issue any such order. *Smith's Mgmt.*, 737 F.2d at 790-92; *see also California Ass'n of Employers v. Building and Const.*

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[6] The Supreme Court, in fact, explained at great length in *Burlington No. R. Co.* that Congress intended the Norris-LaGuardia Act's definition of "labor dispute" to overrule *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), which had held that unions were afforded less protection in activities aimed at "secondary" entities. *See* 481 U.S. at 438.

Trades Council, 178 F.2d 175, 179 (9th Cir. 1949) (holding that union had labor dispute with secondary employer).

As if this error were not bad enough, the opinion's reliance on the "secondary" employer issue threatens to undo Congress' carefully crafted statutory scheme for dealing with such issues. In 1947, Congress enacted a measure entirely separate from the Norris-LaGuardia Act to deal, *inter alia*, with the problem of "secondary boycotts," the Labor-Management Relations Act of 1947 ("LMRA") (popularly known as the Taft-Hartley Act), and, in so doing, specifically "rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions" be lifted in the case of such boycotts. *Northern Stevedoring & Handling Corp. v. International Longshoremen's & Warehousemen's Local 60*, 685 F.2d 344, 348 (9th Cir. 1982). Instead it created in the LMRA a separate and strictly limited procedure authorizing the National Labor Relations Board—and only the National Labor Relations Board—to seek injunctive relief due to any unlawful effects of secondary boycotts, and then only after certain specific administrative steps or procedures had been followed. *See, e.g., Bakery Sales Drivers Local 33 v. Wagshal*, 333 U.S. 437 (1948).

CONCLUSION

In 1960, the Supreme Court reaffirmed that in passing the Norris-LaGuardia Act, "Congress was intent on taking the federal courts out of the labor injunction business." *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960). I respectfully dissent from this court's failure to rehear en banc its unfortunate and unprecedented decision to get back into that business in order to regulate traditional, robust labor speech, in violation of the clear mandate of not only our national labor laws but of our fundamental First Amendment doctrine as embodied in *New York Times v. Sullivan*.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) The Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. provides, as here pertinent:

> **§ 101. Issuance of restraining orders and injunctions; limitation; public policy**
>
> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.
>
> **§ 104. Enumeration of specific acts not subject to restraining orders or injunctions**
>
> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: . . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the therat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. . . .

§ 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or included in said findings of fact made and filed by the court as provided in this chapter.

(b) The Lanham Act, 15 U.S.C. § 1125(c) and 1127 provide, as here pertinent:

§ 1125(c) Remedies for dilution of famous marks

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. . . .

(4) The following shall not be actionable under this section:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and news commentary.

§ 1127. Construction and definitions; intent of chapter

The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

(c) The First Amedment of the United States Constitution provides:

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and or petition the Government for a redress of grievances.